

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN THE MATTER OF:

TOM F.E. FISHER
CATHERINE LYNN FISHER

Debtor

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CASE NO. 05-14007

DECISION

At Fort Wayne, Indiana, on May 4, 2006.

This matter is before the court on debtor's motion, filed pursuant to 11 U.S.C. §522(f)(1), to avoid a judicial lien which allegedly impairs an exemption in real estate. The lien in question is held by First National Bank of Omaha. Notice of the motion has been given to the lienholder and there has been no objection thereto. Despite the fact that the motion is unopposed, the court cannot properly grant it because it fails to allege sufficient facts to state a cognizable claim for lien avoidance pursuant to §522(f)(1).¹ See, In re Wall, 127 B.R. 353, 355 (Bankr. E.D. Va. 1991). Unlike adversary proceedings which contemplate notice pleading, motions initiating contested matters are required to state the grounds for relief "with particularity." See, Fed. R. Bankr. P. Rule 9013.

Not every judicial lien upon exempt property may be avoided. Lien avoidance pursuant to

¹Not only is the motion deficient, but the lienholder has not been given appropriate notice of the motion and the opportunity to object thereto. The notice does not "contain a brief summary of the ground for the motion or have a copy of the motion attached to it." N.D. Ind. L.B.R. B-2002-2(c)(4). Neither does the notice sufficiently describe the property subject to the lien. In addition to these problems, the court notes that neither the motion nor the notice of the opportunity to object to it were served upon the lienholder, but upon an attorney who has not filed an appearance in the bankruptcy. This is not appropriate. In re Rae, 286 B.R. 675 (Bankr. N.D. Ind. 2002). Furthermore, the lienholder is an insured depository institution and it has not been served by certified mail as required by Bankruptcy Rule 7004(h).

§522(f)(1) is available only where the judicial lien impairs a claimed exemption. The concept of impairment was reduced to a mathematical formula by the amendments to §522(f) promulgated by the Bankruptcy Reform Act of 1994. 11 U.S.C. §522(f)(2)(A); In re Thomsen, 181 B.R. 1013, 1015 (Bankr. M.D. Ga. 1995). When the amount due on account of the lien sought to be avoided, all other liens on the property and the amount of the debtor's exemption "exceeds the value that the debtor's interest in the property would have in the absence of any liens" the debtor's exemption is impaired. 11 U.S.C. §522(f)(2)(A)(i) thru (iii). Thus, in order for the court to determine if a judgment lien impairs an exemption to which a debtor may be entitled, in addition to identifying the property subject to the judicial lien, the motion must provide information concerning the value of the property, the amount due on account of all liens against it, the amount of the lien to be avoided, and the amount of the exemption claimed by the debtor. 11 U.S.C. §522(f)(2)(A); see also, Thomsen, 181 B.R. at 1015-16.

While the debtors' motion states that they are entitled to avoid the lien, the motion does not provide any information concerning the value of the property, the amount due on any liens secured by the property, or any information concerning the amount of the exemption actually claimed by the debtor. Furthermore, a review of the schedule of exemptions - Schedule C - reveals that the debtor has claimed an exemption of \$0.00 in the property. In the court's opinion, a claimed exemption of \$0.00 is the equivalent of no exemption whatsoever. In re Berryhill, 254 B.R. at 242; In re Forti, 224 B.R. 323, 327 (Bankr. D. Md. 1998)(where debtors claim exemption of zero, no dollar amount of exemption is preserved). See also, Swaim v. Kleven, 1:04-CV-33 (D. N.D. Ind. 2004); In re Sherbahn, 170 B.R. 137, 140 (Bankr. N.D. Ind. 1994)("the extent of [an] exemption is determined by the value claimed exempt which the debtor placed in its schedule of exemptions."); Ainslie v.

Grablowsky, 149 B.R. 402, 405 (Bankr. E.D. Va. 1993)(“if debtor is entitled to exemption by declaration, then the debtor is be [sic] bound by his declaration”) aff’d sub nom., Addison v. Reavis, 158 B.R. 53 (E.D. Va. 1993), aff’d, Ainslie v. Grablowsky, No. 93-2289, 1994 WL 410995 (4th Cir. Aug. 8, 1994).² Not only does the motion fails to state a cognizable claim for lien avoidance pursuant to §522(f)(1), but without an exemption in the property, there is nothing that § 522(f) can be used to protect. Consequently, debtor’s motion should be denied. An order doing so will be entered.

/s/ Robert E. Grant
Judge, United States Bankruptcy Court

²The court notes that this case was closed on November 28, 2005, and was reopened on debtors’ motion to file a motion to avoid a judicial lien. Once a case has been closed, the debtors may no longer amend their exemptions. In re Bartlett, 326 B.R. 436 (Bankr. N.D. Ind. 2005); In re Clear, 1992 WL 1359570 (Bankr. N.D. Ind. 1992). Since the debtors did not claim an exemption in this property before the case was closed, they may not do so now.